the mortgagee's interest, the mortgagee would only be bound by conditions in the policy which were also contained in the mortgage clause,[18] and would not be bound by an appraisal clause appearing only in the body of the policy.[19] The principal case, however, decides that the phrase "as his interests may appear" when contained in the "mortgage clause" operates to insure the mortgagor's interest and that therefore the legal consequences of an "appointment" follow, except in so far as they are avoided by the express provisions in the clause.

PRINCIPAL AND AGENT AS "PARTIES" IN *Res Adjudicata*.—Because of the two fundamental common law maxims that "each man is entitled to his day in court" and "no man shall be twice harassed for the same cause," the general rule is well established that judgments and decrees are conclusive evidence of facts between, and only between, parties to the litigation, and their privies.[1] While this general definition is almost universally accepted, there exists considerable uncertainty as to just what persons are comprised within the term "parties and their privies."[2] As used in this connection, it is now well settled that the word privies applies only to privies of estate;[3] and consequently under this part of the term only those who are interested in successive rights in particular property are affected by the rule.[4] The classes of persons most frequently embraced under the term as thus used are personal representatives, devisees, grantees and assignees;[5] and since their interests in the property must be acquired subsequent to the adjudication,[6] the reason for holding them bound thereby is apparent.

The word "parties" in the rule has, however, given the courts considerably more difficulty. Although a few cases have held that only parties to the record are to be considered parties bound by the judgment,[7] the courts have recognized the necessity of giving the term a broader meaning.[8] It was clear that when a suit was brought in the name of a nominal party, by the real party in interest, it was a distinct violation of the spirit of the rule that the real party should not be fully bound by the judicial determination of the litigation and so it was declared that the real parties to the suit were parties within the meaning of the rule;[9] and parol evidence could be introduced to ascertain such parties.[10] Often, too, although the suit had been brought by a real party, other persons who had a direct interest in the subject matter took upon themselves the position of parties by actively assist-

[18]Hartford Fire Ins. Co. *v.* Williams (1894) 63 Fed. 925.

[19]Hartford Fire Ins. Co. *v.* Olcott *supra*.

[1]Goundie *v.* Northampton Water Co. (1847) 7 Pa. St. 231; Hoppin *v.* Avery (1891) 87 Mich. 551.

[2]Hart *v.* Moulton (1899) 104 Wis. 349.

[3]McDonald & Co. *v.* Gregory (1875) 41 Ia. 513.

[4]Fogg *v.* Plumer (1845) 17 N. H. 112.

[5]State *ex rel. v.* St. Louis (1898) 140 Mo. 551.

[6]Minnesota Debenture Co. *v.* Johnson (1905) 94 Minn. 150.

[7]Allin's Heirs *v.* Hall's Heirs (Ky. 1819) 1 A. K. Marshall 391.

[8]Rogers *v.* Haines (Me. 1825) 3 Greenl. 362.

[9]Calhoun's Lessee *v.* Dunning (Pa. 1792) 4 Dallas 120.

[10]Tarleton *v.* Johnson (1854) 25 Ala. 300.

ing in the prosecution of the defense; and since the courts believed that the rule could be beneficially extended to them, the word parties has been generally extended to those having a direct interest in the subject matter of the suit, and who have the right to control the proceedings, and to prosecute an appeal.[11] This is certainly the case where the control of such defense is actual.[11] It is not sufficient, however, that a person simply bear part of the expense of the suit;[12] and it has likewise been held that in order that such a person may be thus bound, his participation in the suit must be of sufficient notoriety to apprise the opposing party of the person's real position.[13]

There is, however, at present considerable confusion among the authorities concerning the rule applicable when one of the parties is connected with another suit by the opposing party, by the relationship of principal and agent. If a party has been defeated on the merits in a suit against the agent, it is obvious that to permit the plaintiff to try the same cause against the principal, where the testimony would be the same, is virtually to allow him to litigate the same question twice; and, influenced by this practical consideration, many authorities have held that such a matter decided as to one, is *res adjudicata* as to the other.[14] This result has been based on the legal liability of the principal for the acts of his agent;[15] and on the anomaly which would result from diverse rights of such parties.[16] While this rule apparently works out practical justice if the judgment in the first suit has been favorable to the agent or principal, the fundamental principle of mutuality of estoppel[17] requires that the principal or agent be likewise bound when the judgment has been for the opposing party. This result is open to considerable doubt, and consequently courts holding the above view generally refuse to extend the rule to that extent, thereby practically repudiating the mutuality doctrine.[18] On the other hand, many courts disclaim this rule in its entirety, and hold that the relation of principal and agent is not such as *per se* to make a judgment concerning one *res adjudicata* as to the other.[19] These jurisdictions deny the "privity,"[20] and hold that an estoppel is only established when principal and agent have otherwise brought themselves under the general definition of parties as outlined above.[21] An interesting application of this view was given in a recent Iowa case, *American Express Co.* v. *Des Moines Natl. Bank* (Ia. 1909) 123 N. W. 342, wherein it was held that a carrier was not estopped from proving fraud in the shipment by the

[11]Cecil *v.* Cecil (1862) 19 Md. 72; Stoddard *v.* Thompson (1870) 31 Ia. 80; Schmidt *v.* L. & C. etc. Ry. (1896) 99 Ky. 143.

[12]Hanks Dental Assoc. *v.* Intern. etc. Co. (1903) 122 Fed. 74.

[13]Jefferson etc. Co. *v.* Westinghouse etc. Co. (1905) 139 Fed. 385.

[14]Emery *v.* Fowler (1855) 39 Me. 326; Hill *v.* Bain (1885) 15 R. I. 75.

[15]Anderson *v.* West Chicago St. Ry. Co. (1902) 200 Ill. 329.

[16]Lea *v.* Beakin (1871) 11 Biss. 23.

[17]Simpson *v.* Pearson (1869) 31 Ind. 1; Walker *v.* Phila. (1900) 195 Pa. St. 168.

[18]Emma etc. Co. *v.* Emma etc. Co. (1880) 7 Fed. 401; Atkinson *v.* White (1872) 60 Me. 396.

[19]Lawrence *v.* Ware (1861) 37 Ala. 553; Middleton *v.* Railroad (1876) 62 Mo. 579; Phillips *v.* Jamieson (1883) 51 Mich. 153.

[20]Warner *v.* Comstock (1885) 55 Mich. 615; Fogg *v.* Plumer *supra.*

[21]Castle *v.* Noyes (1856) 14 N. Y. 329; McKenzie *v.* B. & O. R. R. Co. (1867) 28 Md. 161.

consignor because of the recovery of the ostensible value of the package by the consignee. It is submitted that this view, although perhaps pemitting unnecessary litigation in a few instances, is based on sounder principle, and is therefore preferable.

TAXATION OF A SPECIAL FRANCHISE.—Although corporate and so-called special franchises are alike in that both are privileges conferred by the government upon individuals, not belonging to them as of common right,[1] they are not identical. A special franchise is a grant from the public of some particular right wholly independent of the right to exist as a corporation and to exercise corporate privileges.[2] A corporate franchise, the right to exist as a corporation, belongs primarily to the corporators;[3] a special franchise, to the corporation.[4] The former may survive a surrender, or forfeiture, of the latter,[5] and, conversely, a special franchise, as a vested right, may survive a revocation under a State's reserved right of amendment, of the corporate franchise.[6] However, both are subject to the right of the State to tax privileges, which they undoubtedly are.[7] Taxes on privileges, in the absence of express constitutional provision, need not proceed on a basis of valuation but may be of fixed amount or proportioned to the amount of business done.[8]

In view of the distinct character of corporate and special franchises it is obvious that a tax imposed upon the corporate franchise *eo nomine* would not include a special franchise owned by the corporation. In New York, the jurisdiction of the principal case,[9] a tax is levied on the corporate franchise.[10] Another distinct tax on the capital stock of a corporation has been construed to embrace only the tangible personalty.[11] Accordingly, prior to specific legislation, special franchises escaped taxation. In a few jurisdictions these franchises have been deemed taxable as realty on the ground that a franchise to occupy the soil of a street together with actual occupation constitutes an easement.[12] The consequent unavailability in New York of a valuable source of income led to legislation providing for an *ad valorem* tax on special franchises, as realty, this value together with that of the tangible property used in connection therewith, formally locally assessed, to be assessed by state officers.[13] To the contended uncon-

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[1]3 Kent, Comm. 458.

[2]9 COLUMBIA LAW REVIEW 160.

[3]Memphis R. R. Co. *v.* Com'rs. (1884) 112 U. S. 609.

[4]Memphis R. R. Co. *v.* Com'rs. *supra.*

[5]Grand Rapids Bridge Co. *v.* Prange (1877) 35 Mich. 400, 405.

[6]Pearsall *v.* Gt. Northern Ry. (1895) 161 U. S. 646.

[7]Horn Silver Mining Co. *v.* N. Y. (1891) 143 U. S. 305; Society for Savings *v.* Coite (1876) 6 Wall. 594.

[8]Delaware R. R. Tax Case (1873) 18 Wall. 206; State Tax on Railway Gross Receipts (1872) 15 Wall. 284.

[9]People *ex rel.* Jamaica Water Supply Co. *v.* State Board of Tax Com'rs. *infra.*

[10]People *ex rel. v.* Coleman (1891) 126 N. Y. 433; Laws of 1896 Ch. 908 § 182.

[11]People *ex rel. v.* Barker (1895) 146 N. Y. 304.

[12]Consol. Gas Co. *v.* City of Baltimore (1905) 101 Md. 541; Citizens' St. Ry. Co. *v.* Common Council (1901) 125 Mich. 673.

[13]Tax Law § 2, subdivision 3; *id.* § 43; People *v.* Barker *supra.*